NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DYNAMIC TOOLING SYSTEMS, INC., Debtor.	BAP No. KS-06-105 BAP No. KS-06-111
HANTOVER, INC., Appellant, v. BETTCHER INDUSTRIES, INC., Appellee.	Bankr. No. 04-15900-11 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before McFEELEY, Chief Judge, BOHANON, and BROWN, Bankruptcy Judges.

BROWN, Bankruptcy Judge.

In BAP No. KS-06-105, Appellant Hantover, Inc. (Hantover) appeals the bankruptcy court's order confirming a Chapter 11 plan proposed by Appellee Bettcher Industries, Inc. (Bettcher). In BAP No. KS-06-111, Hantover appeals the bankruptcy court's subsequent order modifying the confirmed plan to alter its effective date. The appeals were companioned for briefing and oral argument. For the following reasons, we dismiss both appeals on the grounds of equitable

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

mootness.

I. Background

Dynamic Tooling Systems, Inc. (Debtor) was a Chapter 11 debtor engaged in the design and manufacture of meat trimmers and their components for use in the meat packing industry. The Debtor and/or its principal held several patents relating to its products. Hantover distributed the products manufactured by the Debtor under an Exclusive Distributorship Agreement, dated June 4, 2003 (the Agreement). The Agreement provided that Hantover would be the sole distributor of the Debtor's products for ten years and that, upon expiration or termination thereof, Hantover would be entitled to use a perpetual and irrevocable license to manufacture the Debtor's products, using the Debtor's intellectual property. Bettcher was a competitor of the Debtor. Bettcher also held patents for knives used in the meat packing industry. Prior to and throughout the Debtor's Chapter 11 case, Hantover and Bettcher were involved in various patent infringement disputes.

Hantover was not listed as a creditor of the Debtor and it did not file a claim until after Bettcher's plan was confirmed. The Agreement was listed in the Debtor's schedules as an executory contract and the Debtor's original and amended plans provided that the Debtor would assume the Agreement.

Bettcher was not originally a creditor of the Debtor. After the Debtor filed its first plan of reorganization, however, Bettcher began purchasing claims from the Debtor's creditors and eventually became the holder of all but two of the filed claims in the case, including the only secured claim.

After it had acquired some of the claims, Bettcher filed a competing plan of reorganization. Bettcher's plan provided that its wholly owned subsidiary, R & F Intellectual Property Acquisition, Inc. (R & F), would acquire all of the Debtor's assets free and clear of any liens or interests and that R & F would distribute up to $700,000 to creditors. Bettcher's plan provided that R & F would have thirty

days after confirmation within which to decide whether to assume or reject the Agreement.

Eventually, both the Debtor's second amended plan and Bettcher's plan were submitted to creditors with a combined ballot. Bettcher voted all of the claims it had acquired in favor of its plan. Hantover objected to the confirmation of Bettcher's plan and voted against it. The bankruptcy court did not count Hantover's vote because it did not have an allowed claim at the time of the confirmation hearing. No other dissenting votes were cast on Bettcher's plan. No votes were cast in favor of the Debtor's plan.

Hantover objected to the confirmation of Bettcher's plan based upon the plan's treatment of its executory contract.[1] Hantover argued that Bettcher's plan did not comply with the provisions of the Bankruptcy Code in the following ways: (1) it allowed R & F to assume or reject executory contracts when 11 U.S.C. § 365(a)[2] limits that power to a "trustee"; (2) it allowed R & F up to thirty days after the plan's effective date to assume or reject executory contracts in violation of § 365(d)(2); (3) allowing R & F to reject the agreement after confirmation of the plan effectively disenfranchised Hantover from voting on the plan because it would not have an unsecured claim for damages resulting from a rejection of the Agreement until after voting and confirmation was accomplished; (4) the transfer of the Debtor's assets to R & F free and clear of Hantover's licensee rights violated Hantover's right to elect certain treatment under § 365(n); and (5) the plan potentially provided for the assumption of a nonassignable personal services contract in violation of § 365(c).

The bankruptcy court rejected all of Hantover's legal arguments against

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[1] Hantover also objected on two other grounds, but these two objections were resolved by agreement of the parties prior to the confirmation hearing.

[2] All future statutory references shall refer to the Bankruptcy Code, Title 11, United Stated Code, unless otherwise noted.

confirmation. It determined that Bettcher's plan complied with all the requirements of Title 11 and Chapter 11 and had been accepted by all voting creditors, therefore, it was "left with little choice but to confirm"[3] Bettcher's plan, which it did by an Order, dated October 2, 2006. On October 12, 2006, Hantover timely appealed the order of confirmation, but it did not request a stay pending appeal.

Bettcher's plan provided that its effective date would be the date upon which the confirmation order became "final and nonappealable."[4] Hantover's notice of appeal prevented the plan from being implemented, so Bettcher sought to modify the effective date provision. The bankruptcy court granted Bettcher's motion to modify the plan over Hantover's objection, making the plan immediately effective. Hantover timely appealed the modification order, but again it did not seek a stay pending appeal.

While this appeal was pending, Bettcher filed a motion to dismiss this appeal on the basis of equitable mootness. The motion is supported by the affidavit of R & F's treasurer describing the events which have occurred subsequent to the confirmation of the plan.[5] According to the Affidavit, all of the

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[3] August 31, 2006, Order Overruling Hantover, Inc.'s Objection to Confirmation of Bettcher Industries, Inc.'s Plan of Reorganization Dated July 10, 2006 and Confirming Bettcher's Plan, *in* Appellant's Appendix ("App.") Vol. VI at 1395.

[4] Bettcher Industries, Inc.'s Plan of Reorganization Dated July 10, 2006, at 4, ¶ 20, *in* App. Vol. IV at 1100.

[5] Affidavit of Timothy McNeill (Affidavit), Exhibit A to Bettcher's Motion to Dismiss Appeal and Request for Oral Argument. In the Affidavit, R & F's treasurer affirms that he has personal knowledge of the facts set forth therein and that he would be competent to so testify. *Id.* at 1, ¶ 4. Hantover argues that the Affidavit should be stricken because it contains hearsay and because the reports attached to the Affidavit were not filed with the bankruptcy court. We disagree. *In re Long Shot Drilling, Inc.*, 224 B.R. 473, 477 n.3 (10th Cir. BAP 1998) (which rejected a similar objection, noting that if a post-appeal development occurs that affects the court's jurisdiction, the parties have a duty to bring it to the court's attention) (citing *Board of License Comm'rs v. Pastore*, 469 U.S. 238,

(continued...)

Debtor's assets have been transferred from the Debtor to R & F, including a physical move from Kansas to Ohio; the Debtor's manufacturing operation has been shut down; the $700,000 to be paid to creditors has been completely distributed; and certain adversary proceedings contemplated by the plan have been commenced.[6]

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[7] A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[8] The bankruptcy court's Order confirming Bettcher's plan and the Order modifying the plan were final orders for purposes of 28 U.S.C. § 158(a).[9] Hantover's notices of appeal were timely filed within ten days of entry of the Orders. Neither party elected to have these appeals heard by the district court for the district of Kansas. Thus, this Court has jurisdiction to review the Orders.

III. Discussion

An appellate court has the obligation to determine whether an appeal is moot in the constitutional sense, depriving the reviewing court of the appellate jurisdiction it initially possessed. It must also determine whether an appeal is

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[5] (...continued)
240 (1985)).

[6] Affidavit at 1-2, ¶¶ 5-7, 9.

[7] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[8] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (citation omitted).

[9] *Interwest Bus. Equip., Inc. v. United States Trustee (In re Interwest Bus. Equip., Inc.)*, 23 F.3d 311, 315 (10th Cir. 1994); *In re Long Shot Drilling, Inc.*, 224 B.R. at 477.

equitably moot, in the sense that the implementation of appellate relief, while possible, would be inequitable due to circumstances which have occurred after the appeal was filed.[10]

The doctrine of constitutional mootness applies where an event has occurred after an appeal is filed, which makes it impossible for the reviewing court to grant any effectual relief. In such a situation, there is no longer a "case or controversy" and the constitutional basis for federal jurisdiction no longer exists.[11] Bettcher does not argue that the doctrine of constitutional mootness is applicable in this case, focusing instead only on equitable mootness. Equitable mootness is a doctrine applied in bankruptcy cases in circumstances in which it would be unjust and/or impractical to modify a substantially consummated plan of reorganization. "Equitable mootness deals with parties' reliance upon a substantially consummated plan of reorganization and the point at which modification of that plan would unduly impact innocent third parties."[12]

This Court has adopted the five factors identified by the Court of Appeals for the Third Circuit in *In re Continental Airlines*,[13] to analyze whether an appeal should be dismissed on equitable mootness grounds.[14] The five factors are: (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy

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10 *In re Inv. Co. of the Sw., Inc.*, 341 B.R. 298, 306 (10th Cir. BAP 2006).

11 *Id.*

12 *Id.* (citing *In re Milk Palace Dairy, LLC,* 327 B.R. 462, 467 (10th Cir. BAP 2005)).

13 91 F.3d 553 (3d Cir. 1996).

14 *In re Long Shot Drilling, Inc.*, 224 B.R. at 479.

judgments.[15] These five factors are given different weight depending on the facts and circumstances of each particular case.[16] In this case, all five of the factors indicating equitable mootness are present.

The first factor, substantial consummation of the plan, is defined in § 1101(2) as:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
> (B) assumption by . . . the successor to the debtor . . . of the business or of the management of all or substantially all of the property dealt with by the plan; and
> (C) commencement of distribution under the plan.

The Affidavit of R & F's treasurer establishes, and Hantover does not dispute, that Bettcher's plan has been substantially consummated. The Affidavit reflects that the Debtor transferred all of its assets to R & F and that R & F transferred them from the Debtor's former business location in Kansas to Ohio.[17] Some of the Debtor's assets have been incorporated into manufacturing operations in Ohio and the Debtor's business operations have been discontinued.[18] The Affidavit also reflects that Bettcher disbursed $700,000 to R & F pursuant to the terms of the confirmed plan and that this entire amount has been distributed by R & F to administrative claimants and to priority and secured creditors.[19] Additionally, R & F has investigated and commenced certain adversary proceedings as contemplated by the plan.[20]

Substantial consummation by itself is insufficient to render an appeal

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15 *In re Continental Airlines*, 91 F.3d at 560.

16 *Id.*

17 Affidavit at 1, ¶¶ 5-6.

18 *Id.*

19 *Id.* at 2, ¶ 7.

20 *Id.*, ¶ 9.

equitably moot, but it is a very important factor. The court in *Continental Airlines* described it as the "foremost consideration" in a reorganization involving intricate transactions.[21] This Court has indicated that substantial consummation of a confirmed plan raises a "strong presumption" that an appeal of the confirmation order should be dismissed.[22] While the substantial consummation factor may not be as significant in a case where the confirmed plan is less complicated, as was the case in *In re Investment Company of the Southwest, Inc.*,[23] it is still an important factor.

The second factor weighing in favor of equitable mootness is Hantover's failure to obtain a stay pending appeal. While this issue arises in every case in which equitable mootness is considered, it is particularly significant here where Hantover did not even attempt to obtain a stay of the order which caused the plan to become immediately effective, despite knowing that Bettcher and R & F intended to proceed to consummate the plan quickly. "The party who appeals without seeking to avail himself of that protection does so at his own risk."[24]

This case presents a unique situation with respect to the third equitable mootness factor. The distribution of $700,000 to creditors does not create the same impact on innocent third parties and parties not before the court as one would expect in a more typical Chapter 11 reorganization. This is so because, of the $700,000 distributed by R & F, $549,000 was paid to Bettcher itself on account of the secured claim it purchased. A reversal of the order of confirmation, however, would impact the recipients of the balance of the $150,000 distributed by R & F. These parties include six former employees who

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21 91 F.3d at 560-61.

22 *In re Long Shot Drilling, Inc.*, 224 B.R. at 480.

23 341 B.R. 298, 309-10 (10th Cir. BAP 2006).

24 *In re Chateaugay Corp.*, 988 F.2d 322, 326 (2d Cir. 1993).

received $7,117.50 on account of their administrative claims for wages and vacation pay, six other administrative claimants, including the attorneys for the Debtor, who received a total of $66,215.97, and the Internal Revenue Service, which received $5,035.31 on its administrative expense claim, $55,170.19 on its secured claim and $17,133.06 on its priority unsecured claim.[25] Unlike the situation in *In re Investment Company of the Southwest*, however, where this factor was neutralized because the appellant indicated it would not seek the return of the payments made to administrative claimants under the confirmed plan, Hantover has made no such assurances. We have no reason to believe that all of the innocent payees would have the ability to return the payments at this late date. The doubt concerning whether, as a practical matter, these payments could be unwound, coupled with the unfairness of ordering their return from persons who are not before the Court and who had no reason to question the finality of the confirmation order, weighs significantly against the Court's consideration of Hantover's appeal.

The fourth factor, whether the relief requested would affect the success of the plan, unquestionably weighs in favor of equitable mootness. If Hantover were successful in obtaining the relief it seeks from this Court, the order of confirmation would be reversed and the matter remanded to the bankruptcy court. At this point, it is impossible to speculate on the likely outcome of the case, but we note that there was no other confirmable plan before the court at the time Bettcher's plan was confirmed. Hantover's dissenting vote, if allowed in the full amount of the claim it filed after confirmation, would prevent "reconfirmation" of Bettcher's plan, in addition to a pending motion filed by the United States Trustee to dismiss or convert the case at the time the plan was confirmed. The future success of Bettcher's plan seems unlikely to say the least. As to the Debtor's

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[25] Ex. 1 to Affidavit.

plan, it failed to secure the necessary votes for confirmation.

Finally, the Court believes that the public policy in favor of affording finality to confirmation orders is present here, as it is in every case involving the appeal of an unstayed order of confirmation. Because no stay was obtained by Hantover, employees were paid and, likely, spent their wages, property was removed and transferred and is being reused elsewhere. Lawsuits were commenced. All of these actions and more were undertaken based on the confirmation order. To nullify the order would require an unwinding of these actions. The chilling effect of such a decision on future debtors' ability to reorganize cannot be precisely measured, but is certainly not insignificant.

IV. Conclusion

All of the factors indicating that it is appropriate to apply the doctrine of equitable mootness are present in the case. We therefore conclude that this doctrine prevents us from considering the merits of Hantover's appeals. Bettcher's Motion to Dismiss appeals KS-06-105 and KS-06-111 is GRANTED.[26]

[26] Appellant's Motions Regarding Deficiencies and to Supplement Record on Appeal, filed January 25, 2007, is HEREBY GRANTED with regard to Appellant's brief and appendix deficiencies.